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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Sections of the)
Cable Television Consumer)
Protection and Competition Act of)
1992)
)
Rate Regulation)

MM Docket No. 93-215

TO: The Commission

**DISCOVERY COMMUNICATIONS, INC.,
OPPOSITION TO PETITION OF
BELL ATLANTIC FOR FURTHER RECONSIDERATION**

Discovery Communications, Inc. ("Discovery"), by its attorneys, hereby opposes Bell Atlantic's petition for reconsideration of the Commission's First Report and Order and Further Notice of Rulemaking in MM Docket No. 93-215,¹ in which Bell Atlantic urges the Commission, in the name of "regulatory parity," to apply to the cable industry, among other things, the affiliated transaction rules developed to address abuses in the much different context of the telephone industry.

Bell Atlantic's petition renews its ongoing quest to apply identical regulations to all aspects of the telephone and cable industries despite the significant historical, structural, and operational differences between the two industries. Discovery

¹ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, First Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 93-215, FCC 94-89 (rel. March 30, 1994) ("First Report and Order").

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submits that the automatic application to cable of rules adopted in the common carrier context not only would ignore fundamental differences between the industries, but also would undermine a major goal of the 1992 Cable Act -- the promotion of high quality programming at reasonable rates.²

The Commission already has determined that "[t]elephone companies have failed to advance a sufficient reason why we should adopt as an overriding policy goal achieving regulatory parity,"³ and that its regulations for the respective industries should be based on factors relevant to each industry. Bell Atlantic's petition adds nothing to warrant a change in this approach and thus should be rejected.

The need to address each industry separately is perhaps best exemplified by the Commission's affiliate transaction rules, which govern the accounting of transactions between affiliated cable operators and programmers. These rules will apply to cable operators "who either elect cost-of-service regulation or seek to adjust benchmark/price cap rates for affiliated programming

² Both Congress and the Commission have recognized the importance of programming. The Commission properly has sought to ensure that its rate regulations do not inadvertently harm existing programmers or inhibit investment in new program services. See, e.g., First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, 9 FCC Rcd 1164, 1228 (1993) ("[W]e attach great importance at this stage of rate regulation to the continued growth of programming.").

³ First Order on Reconsideration in MM Docket No. 92-266, FCC 93-428 (rel. Aug. 27, 1993) at ¶ 90.

cost."⁴ The Commission has stated that cable operators subject to these rules would be "required to apply valuation methods that are similar to those telephone companies are now required to apply."⁵ These include a "prevailing company price" policy for cable operators to use in valuing transactions with affiliates that also sell the same kind of asset to a substantial number of third parties.⁶ In addition, the Commission has sought further comment on whether even more stringent rules under consideration in the telephone context should apply to cable as well.⁷

Discovery believes that the current cable affiliate transaction rules would pose a real threat to the public interest by possibly impeding legitimate business transactions that are fundamental to the well-being of cable programmers and, in turn, the quality of programming offered to the public. This threat is created by woodenly applying rules developed for one industry to another quite different industry when there are significant distinctions between the two industries.

⁴ First Report and Order at ¶ 262.

⁵ Id.

⁶ The affiliate transaction rule adopted by the Commission equates the sale of programming with the sale of an asset. Id. at ¶ 267. When an affiliate sells an asset to a cable operator, the "assets shall be valued at the [affiliate's] prevailing company price, if the provider has sold the same kind of asset to a substantial number of third parties at a generally available price." Id. at ¶ 263.

⁷ Id. at ¶ 310.

As an initial matter, the incentives for programmers are wholly distinct from those of traditional telephone company affiliates. Historically, abuses in the common carrier area occurred because the affiliated entity, typically a wholly-owned subsidiary, was established primarily to serve a captured market -- an affiliated carrier.⁸ Outside sales, if not refused, were secondary to the affiliate's business plan. This was the pattern not only in the events leading to the divestiture of AT&T, but also more recently in the NYNEX/MECO scandal. New York Tel. Co. and New England Tel. Co. Violations of Commission's Rules, 5 FCC Rcd 5892 (1990). To preclude improper cross-subsidization, the Commission therefore needed to devise restrictive rules to govern such relationships.

In contrast, the cable programmer affiliate stands in a quite different posture. Its primary goal is not to serve its affiliate, but to maximize distribution and viewership. This is especially true for services, like The Discovery Channel, which derive significant revenue from advertising. Sales to affiliates, in these instances, are merely incidental to, and a necessary by-product of, the need to maximize distribution. Therefore, the unique incentives facing programming affiliates do

⁸ Typically, a regulated entity would create a corporate affiliate designed to provide goods or services on an unregulated basis, a relationship which presented opportunities for abuse. In contrast, cable industry program services often originated entirely independently of cable operators, and only later would a corporate affiliation be established.

not raise the same concerns as are present in the telephone context.

Moreover, public policy considerations present in the cable industry, but absent in the telephone business, cast doubt on the wisdom of having cable affiliate transaction rules at all. Most notable of these is the fact that cable operators historically have, to a significant degree, provided crucial financial support to programmers at critical times in their development. On numerous occasions, cable operators contributed much-needed financing to ensure the viability of a program service.

Discovery's own existence is a prime example of this phenomenon. Without repeating Discovery's early struggles for survival in detail here, suffice it to say that without the financial support of several cable operators, it is unlikely that Discovery would have evolved into the highly acclaimed service that it is today. Other programmers similarly owe their current existence to financial support from cable operators.

The Commission must ensure that programmers are not deprived of a traditional and major source of financing, particularly at this time of fundamental change in the industry. Applying affiliate transaction rules designed for common carriers to the sale of cable programming may, unintentionally, have the adverse effect of constraining the incentives for cable operators to invest in existing and new program services. This could well force programmers to seek more costly outside financing (which

will, in the end, increase the cost and/or reduce the quality of the programming). It also could increase the pressure on cable operators to move affiliated programming to à la carte offerings -- which advertiser-supported program services would regard as undesirable. Neither result would serve the public interest.

Given the above, Bell Atlantic's proposal to apply the identical affiliate transaction rules to the cable and telephone industries is flawed. Simplistic notions of "regulatory parity" ignore the more compelling principle that differently situated industries should be regulated differently.

For the foregoing reasons, Discovery Communications, Inc., respectfully submits that the Commission should deny the Bell Atlantic petition for reconsideration. There is no reason to apply affiliate transaction rules developed to rectify abuses in the telephone industry to the cable industry, where application

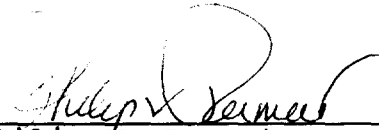
of such a rule could have an unintended adverse impact on programming.

Respectfully submitted,

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June 16, 1994

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 1994, I caused copies of the foregoing "Discovery Communications, Inc., Opposition to Petition of Bell Atlantic for Further Reconsideration" to be mailed via first-class postage prepaid mail to the following:

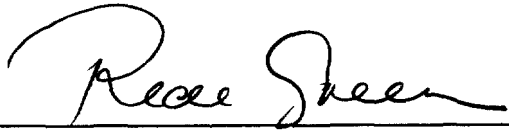
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